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No. 88-717 (2)

In The
Supreme Court of the United States
October Term, 1988

BILLY L. ALLARD,

Petitioner,

vs.

MARTHA PARTEN FRECH, INDEPENDENT EXECUTRIX OF THE ESTATE OF BILLIE J. ALLARD, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

JOHN R. LIVELY
Counsel of Record
NEAL S. CALLAWAY
1130 Forth Worth Club Tower
Fort Worth, Texas 76102
(817) 338-1616

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

Hpp.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner waived his right to claim federal pre-emption of state law.

2. Whether the Texas Supreme Court correctly decided this case on the merits.

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RULES OF PROCEDURE:

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OPINION BELOW

The opinion of the Supreme Court of Texas is reported at 754 S.W.2d 111 (Tex. 1988) and is attached to Petitioner's appendix at page A-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari to the Supreme Court of Texas.

STATUTES AND RULES OF PROCEDURE INVOLVED

Sup. Ct. R. 17 provides in pertinent part as follows:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
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> * * *
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

COUNTERSTATEMENT OF THE CASE

The Probate Court, Number Two of Tarrant County, Texas on March 13, 1986 ordered that one-half of the retirement benefits of Billie J. Allard, deceased, and Billy

L. Allard was owned by the Estate of Billie J. Allard pursuant to community property laws of the State of Texas. The trial court found that the retirement benefits were a vested community asset and that there was no written instrument or document signed by the deceased Billy J. Allard designating the disposal of her community interest in the retirement benefits.

Petitioner filed an appeal to the Court of Appeals at Forth Worth challenging the trial court's determination that retirement benefits received by Petitioner at time of his wife's death were community assets under state law. The Court of Appeals held that retirement benefits were a community asset.

Petitioner appealed to the Texas Supreme Court challenging the Court of Appeals ruling that the retirement benefits were a community asset and the Supreme Court affirmed the Court of Appeals. Petitioner in his Motion for Rehearing in the Supreme Court raised for the first time the argument that ERISA pre-empted state community property law. The Supreme Court did not rule on Petitioner's pre-emption argument.

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REASONS FOR DENYING THE WRIT

The petition sought by Allard should be denied on three specific grounds:

1) no grounds of national importance for granting certiorari exist;

2) the petitioner waived his right to claim federal pre-emption of state law;

3) the Texas Supreme Court correctly decided this case on the merits.

The United States Supreme Court Rule of Civil Procedure Rule 17 mandates that review by writ of certiorari is not a matter of right, but of judicial discretion. The Rule sets out three non-binding criteria used by the Supreme Court when deciding whether or not to grant a writ or not. The petitioner fails to meet any of the three.

While the petitioner claims that this case involves issues of great national importance, he failed to raise the issue of federal pre-emption of Texas community property law in the pension regulation area until after the Texas Supreme Court ruled on the merits of the petitioner's case. No Texas court has ruled on the issue of pre-emption of community property law as framed by petitioner in his Petition for Writ of Certiorari. Accordingly, there exists no conflict between Texas law and federal law.

Whether or not ERISA serves the vital federal goal of establishing pension plan regulation as an exclusive federal concern to the exclusion of Texas community property law, as the petitioner claims, no Texas court has ruled on that issue. (Petitioner's Writ, p. 9). The Texas Supreme Court correctly ruled on the merits as presented by petitioner and that ruling was based on a sound interpretation of Texas community property law. The United States Supreme Court has said, "we have no authority to review state determinations of purely state law." *International Longshoremen's Association v. Davis,* 476 U.S. 380, 106

S.Ct. 1904, 90 L.Ed.2d 389 (1986). Texas community property law mandates an equal division of marital assets as was done in this case, and the petitioner raised no federal law which might have required a different ruling by the Texas Courts.

Secondly, pre-emption is not available for review. The petitioner concedes its failure to raise the issue of pre-emption of Texas community property law by the Employee Retirement Security Act until its Motion for Rehearing in the Texas Supreme Court. Texas and federal law do not allow a litigant to raise federal pre-emption, as a choice of law matter, in a direct or collateral attack at any time.

Petitioner maintains that "Texas and federal law allow the question of federal pre-emption, as a jurisdictional matter, to be raised at any time, as a direct or collateral attack." (Petitioner's Writ, p. 19). However, there exists no jurisdictional dispute in this case but rather a choice of law dispute, i.e., the dispute could be litigated in state or federal court. *See Dueringer v. General American Life Insurance Company,* 842 F.2d 127, 130 (5th Cir. 1988) (ERISA pre-emption clearly is a choice of law question and therefore must be asserted as an affirmative defense).

The petitioner mis-cites *International Longshoremen's Association v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed. 2d 389 (1986), for the proposition that one may raise pre-emption of state law by ERISA at any time. *Longshoremen's* involved the National Labor Relations Act which provides for a sole and specific forum in which labor disputes within the National Labor Relations Act must be heard. Since the Court in *Longshoremen's* determined that

the dispute was jurisdiction and not choice of law, then jurisdiction could be raised at any time.

Such is not the case with ERISA. ERISA is solely substantive federal law which may be applied at the state or federal level. ERISA, unlike the NLRA, does not require that disputes within its statutory scope be heard in a specific forum, hence state or federal court may exercise valid jurisdiction over a pension dispute and it is up to the litigants to raise the applicability of ERISA as a choice of law if the litigant wants federal law applied instead of state law.

Thirdly, the respondent does not dispute the pre-emptive force of ERISA in the pension regulation area. However, the petitioner cites cases (Petitioner's Writ, pp. 16-17) in which the pre-emption mandated by the Supreme Court did not serve to undermine an ancillary body of law, i.e., community property law, as would occcur in this case if absolute pre-emption is found.

ERISA does not necessarily "serve[] the vital federal goal of establishing pension plan regulation as an exclusive federal concern and avoiding the confusion and chaos of a patchwork of local regulations," as claimed by petitioner. (Petitioner's Writ, p. 9). The passage of the Retirement Equity Act (REACT) amendments to ERISA, effective January 1, 1985, as a clarification of ERISA, worked to accommodate state law with federal law and to preserve the community property laws of the eight community property states. The REACT amendments serve as Congressional notice that ERISA was not intended to pre-empt entirely a state's community property law, since REACT clearly dictates that qualified domestic relation

orders are not pre-empted by ERISA. It follows that REACT was passed in order to make ERISA more accommodative to the laws of community property states, and not in order to enact sweeping pre-emption of community property law.

While admittedly REACT fails to address probate orders which affect pension benefits, in this case the probate order was made pursuant to the very community property law which Congress sought to accommodate through passage of the REACT amendments. Texas community property law hardly represents "a patchwork of local regulations," deserving of total pre-emption as claimed by petitioner, and for the reasons hereinabove does not conflict with ERISA. To argue otherwise would be to suggest that Congress intended to jeopardize the entire body of state community property law by pre-emption in the pension area.

The case of *In Re Marriage of Campa*, 152 Cal. Rptr. 362 (1979) formulated some factors important to this analysis of whether ERISA pre-empts a state's community property law. A few factors considered by the *Campa* court at 368 paraphrased here include:

(1) Community property law as applicable to the case before us is concerned with effectuating a fair division of the monthly pension check between the former spouses. This concern plainly has no bearing on the effort of Congress embodied in ERISA, to assure genuine pension rights:

(2) Domestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts.

Furthermore, ERISA was enacted in order to legislate pension reform aimed toward eradicating inadequate, mismanaged and illusory pension plans which had left many hard working individuals with little financial security in their senior years. House report number 93-533 (1974) U.S. Code Congress and Admin. News, p. 4639, et seq. An equitable division of pension benefits under Texas community property law between live spouses pursuant to divorce or between a live spouse and a dead spouse's estate only works to give partners in marriage or their heirs what is rightfully theirs and the disposition of benefits in no way conflicts with ERISA. Both ERISA and community property law work complement each other in providing pension security for both spouses or their heirs and Texas community property law accomplishes important objectives that do not conflict with those of Congress.

Lastly, ERISA and the REACT amendments do not provide for termination of a non-employee spouse's interest in the other spouse's pension benefits after the death of the non-employee spouse. Therefore, there is no apparent conflict between ERISA and Texas community property law on the issue of whether a deceased spouse's interest in pension benefits terminates and Texas community property law applies. Since there was no testamentary agreement between the spouses as to an equitable division of the pension benefits, only Texas community property law can equitably ensure that both spouses or their heirs are treated fairly.

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CONCLUSION

WHEREFORE, Respondent Martha Parten Frech, Independent Executrix of the Estate of Billie J. Allard, Deceased prays that this Honorable United States Supreme Court deny Petitioner's application for Writ of Certiorari.

Respectfully submitted,

JOHN R. LIVELY
Counsel of Record
NEAL S. CALLAWAY
1130 Forth Worth Club Tower
Fort Worth, Texas 76102
(817) 338-1616

Attorneys for Respondent